IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 13157 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KIRTIBHAI K. BHATT - Petitioner
Versus
BARODA MUNICIPAL CORPORATION & 1 - Respondents

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Appearance :
MR YN OZA for Petitioner:
MR PRANAV G DESAI for Respondents : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 15/10/2007

ORAL JUDGMENT

Heard learned counsels for the parties.

1. The petitioner under Article 226 of the

Constitution of India has challenged the order dated 20/09/1993 communicated by Dy. Municipal Commissioner that the Commissioner has decided to prematurely retired the petitioner w.e.f. 30/10/1993.

2. Facts in brief deserve to be set out for appreciating the controversy in the petition.

The petitioner joined the service of the respondent Baroda Municipal Corporation as temporary Clerk on 19/8/1960. He came to be confirmed as Clerk in 1962. Petitioner again came to be promoted to the post of Sanitary Sub Inspector in the year 1963 and in the year 1964 he came to be promoted as Sanitary Inspector, and again in the year 1989 he came to be promoted to the post of Sr. Sanitary Inspector. Petitioner has made averments in the petition that as per the knowledge of the petitioner the petitioner had not been given any chargesheet nor was he subjected to any prosecution nor was any criminal case pending against him. These averments have been made in para 4 and 5 of the petition. The petitioner has stated that one departmental inquiry was initiated against the petitioner on the basis of the chargesheet dated 27/8/1991. It is particularly stated by the petitioner that after the said inquiry he was placed under suspension vide order dated 3/1/1991. On page-5 of the petition, petitioner

has further stated that the departmental inquiry was held on the basis of the allegation that someone else was found responsible, namely the Assistant Municipal Commissioner, however till the date of filing of the petition the report of the Inquiry Officer had not been provided to the petitioner and no order of punishment had been served to the petitioner. The order of suspension was subsequently revoked on 29/11/199. The petitioner has assailed the order dated 30/10/1993 where under competent authority i.e. Municipal Commissioner, Baroda Municipal Corporation retired the petitioner prematurely on account of being inefficient and unable to carry out his duties as Sr. Sanitary Inspector.

3. Shri. R.K. Savjani for Shri. Oza, learned counsel for the petitioner has submitted that:-

(i) The impugned order in terms contains that the same was passed on the basis of the Circular of the Corporation dated 20/9/1993 and as the respondent did not follow the provisions of the Circular dated 20/9/1993 the order of prematurely retiring the petitioner is bad in eye of law.

(ii) Learned counsel for the petitioner has further submitted that the competent authority i.e. Municipal Commissioner did not form the

requisite opinion which he was required to form before ordering premature retirement of the petitioner.

(iii) Learned Counsel for the petitioner has further submitted that the order of prematurely retiring the petitioner can not be passed in lieu of departmental proceedings and therefore the order impugned deserves to be quashed and set aside.

(iv) Learned counsel has relied upon the decision of this Court in respect of Special Civil Application No. 28 of 1990 decided in October 1990 and submitted that the impugned order was clearly not in consonance with the principle time and again pronounced by the Court for passing the order.

(v) Learned counsel has further relied upon the decision of the Apex Court in case of IK MISHRA V. UNION OF INDIA AND OTHERS, reported in (1997) 6 SCC 228, in support of his submission that non formation of opinion before passing of the premature retirement order amounts to patent illegality rendering the order impugned null & void. Learned counsel has further relied upon another decision of the Apex Court in case of STATE OF GUJARAT V. UMEDBHAI M. PATEL, reported in (2001) 3 SCC pg. 314, in support of his submission that the impugned order ought not to

have been passed in extraneous consideration and therefore the order dated 30/10/1993 is required to be quashed and set aside.

4. Except the aforesaid submissions, no OTHER submissions are canvassed at the Bar and only on these three aforesaid decisions are relied upon by Shri. Savjani, learned counsel for the petitioner.

5. Shri. Pranav Desai, learned counsel for the respondent Corporation has submitted that this petition deserves to be dismissed on the ground of suppression of material facts and misleading of this Court in the first instant. Shri. Desai has invited this Court's attention to the averments made by the petitioner on page no.4 of the petition. The relevant portion of the said para deserves to be set out as under:

" 4. "... The petitioner states that it was on the basis of one chargesheet dated 27th August 1991. That for the same allegation, the petitioner was suspended from service by an order dated 3-1-1991. That a departmental inquiry was held on the basis of the said allegations and at the time of the departmental inquiry, it was borne out that in fact, the petitioner is not at fault, but one Mr. Anile Patil who was working as Assistant Municipal Commissioner and under whom the petitioner was working as Senior Inspector was at fault. That till today, the report of the inquiry officer has not been provided to the petitioner and no order of punishment has been served to the petitioner. "

6. Shri. Desai has invited this court's attention to page-46; forming part of the affidavit in reply on behalf of the respondent, and submitted that the petitioner is misleading the Court and the petition suffers from the vice of suppression of material facts and misleading the Court. The affidavit in reply in terms contain the fact of inquiry proceedings were being concluded and Municipal Corporation had issued show cause notice to the petitioner on 19/5/1993 and considering reply given by the petitioner to show cause notice the Commissioner of the Corporation passed an order No. 825/93-94 dated 30/8/1993 punishing the petitioner and the copy of the said order is produced at Annexure-II to the affidavit. The order indicate clearly that the punishment was imposed and in pursuance thereto the petitioner did pay the amount of Rs.100=00. The petitioner has not explained as to why these facts were not stated as he was in fact in receipt of the order where under the fine of Rs.100=00 was imposed and copy of the said order was in fact received by the petitioner. Despite this, the petitioner, as stated herein above, has made false statement on oath in the petition only with a view to obtain favourable orders from this Court. Shri. Desai has further submitted that without prejudice to the aforesaid contention the material placed on record go to show that it was absolutely just and proper for the Commissioner to retire the

petitioner on premature basis as retention of the petitioner was not in the public interest. Shri. Desai has invited attention of this Court to the grounds forming part of the file wherein it is stated that in the last six months about 19 explanations were sought for from the petitioner, out of which 13 explanations and memos have remained un-replied and the six replies given have not been satisfactory. This remarks go to show that this is the reason why the assessment was not done. This line forming part of the submission dated 8/10/1993 is heavily relied upon by the petitioner's advocate to show that this is clearly go to show that there was no opinion forming exercise undertaken by the competent authority as envisaged and required under the Rules.

7. Shri. Desai has submitted that the sufficiency of material can not be gone into by the Court under Article 226 of the Constitution of India while examining the challenge to the order of premature retirement. Therefore Shri. Desai has submitted that, in view of this and in view of the total facts & circumstances of the case, the petition deserves to be dismissed. Shri. Desai also submitted that the petitioner has wrongly relied upon Clause 15 of the Circular as he had not completed 57 years on the date when he was sought to the retired. Shri. Desai submitted that in fact the circular in question is

merely a circular laying down modalities and procedures and it can not be said to have conferred any right upon the employees governed by the same so as to militate against the order of premature retirement, warranting premature retirement of an employee in the interest of public. Shri. Desai has thus submitted that reliance upon clause 15 of the Circular as it is stated herein above is of no avail to the petitioner.

8. This Court has heard learned counsels at length and perused the record. Shri. Desai's submission with regard to suppression of material fact and misleading statement can not be lightly brushed aside in view of the facts emerging on the record. The petitioner has in fact stated on oath on page -5 of the petition that till the date of filing of the petition i.e. 11/11/1993 the petitioner did not receive copy of the report of the Inquiry Officer and no order of punishment had ever been served upon the petitioner. This statement is said to be misleading and not giving correct facts as the petitioner is said to have been in receipt of the order dated 30/8/1993. The petitioner has in fact appended his signature as the copy was marked to him and his signature is clearly said to have been appended. The said order also talks about issuance of show cause notice on 19/5/1993 and even petitioner's reply to it and fine of

Rs.100=00 imposed by the Commissioner. The petitioner had in fact made payment of Rs.100=00. All these documents unequivocally show that the petitioner has in fact not narrated the correct facts before this Court and therefore the petitioner has not come to the Court with clean hands.

9. Apart from the aforesaid, this Court is also of the view that sufficiency of the material available on the record can not be subject matter of examination under Article 226 of the Constitution of India when the order of premature retirement is challenged. It goes without saying that the exercise of prematurely retiring an employee after he attains 50 years age is provided under Rule 161 of BCSR and it is not disputed by the petitioner that Rule 161 of BCSR is applicable to the employees of the corporation. It was rather admitted by learned counsel Shri. Savjani that Rule 161 BCSR is applicable and governing the employees of the Corporation. The absolute right is vested in the State as well as to the employee to end the employment with the State which will not jeopardies employee's right to receive pension or State's right to end his employment without affecting his right to receive retirement dues. Against this absolute right of employer the challenge to the premature retirement is required to be examined. The decision relied upon by the petitioner has also been relied

upon by the respondent in Special Civil Application No. 28 of 1990 which go to show that the sufficiency of the material can not be subject matter of examination in the challenge to the order of premature retirement. Relevant paragraph at 11 (running page no.38) deserves to be cited which would got to show that how the order of challenge to the premature retirement is dealt with:-

" It is true that since an action of compulsory retirement is not penal in nature,the principles of natural justice do apply in such cases. As held by the Supreme Court in Colonel J.N. Sinha's Case (Supra), the provisions relating to compulsory retirement do not in terms require that an opportunity should be given to the concerned Government Servant to show cause against his compulsory retirement. In fact, it is "absolute right of the Government" to retire a Government servant if it is of the opinion that it is in the public interest to do so. If the authority bonafide forms that opinion, the correctness or otherwise of that opinion, cannot be questioned before the Court. The Court is not an appellate forum to decide the propriety of such opinion formed by the Government.

But at the same time, it should not be forgotten that such opinion must be bonafide, genuine and reasonable and not arbitrary or unreasonable though the Courts are not appellate authorities they can certainly go into the foundation of the requisite opinion formed by the Government notwithstanding the form of the order. "

Thus, what is to be looked into by the Court is whether the order passed is bonafide, for

genuine and reasonable reason and is not suffering from vice of arbitrariness on the part of the authority passing the order. If the order of premature retirement is suffering from either of the aforesaid vices then it is open to be quashed. In the instant case the counsel for the petitioner has candidly admitted that the allegation of malafide is of course levelled only against one Chaudhari. It deserves to be noted that the order of premature retirement is passed by Commissioner against whom no allegation of malafide is levelled by the petitioner.

10. As against this, the material produced on record indicating that the petitioner had in fact been suspended twice, i.e. on 28/8/1979 and again on 29/11/1991, that is why the retention of petitioner was not in public interest. It is also on the record that the petitioner was required to be served with umpteen number of memos at number of times either for negligence in performance of his duty or for seeking his clarification on his dubious actions. Petitioner has not bothered to reply to majority of the memos. Against this backdrop the note about assessment deserves to be viewed which rather would go to show forthrightness on the part of the officer who was observing the same. But that did not deter the concerned authority i.e. the Commissioner from forming an

opinion that the officer concerned – the petitioner, was not required to be retained in service in the interest of public which cannot be said to be arbitrary in any manner. It is stated that the petitioner, because of his advanced age nearing for retirement had developed problems, on account whereof he had difficulty in appending his signature to official documents. This statement of the petitioner also deserves to be borne in mind which clearly indicate that the petitioner had development a kind of incapcacity to discharge his duties which is one of the grounds for discharging the petitioner on premature basis.

11. This Court is of the opinion that, not only on the ground of suppression of material facts but also on merits the petitioner has no case and the same is required to be dismissed. The petition is dismissed accordingly. Rule discharged. Interim relief, if any granted earlier, shall stand vacated. No costs.

[S.R. BRAHMBHATT, J]

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